

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS

Cases 28-CA-262356
28-CA-262458

and

KYLE HAIL,
An Individual

and

SALVADOR PLASCENCIA,
An Individual

Mathew Sollett, Esq. for the General Counsel.
Daniel Shanley and Judy Kang, Esqs. (DeCarlo and Stanley, APC),
Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried via Zoom video technology on May 17-21, 2021. Kyle Hail filed the charge in 28-CA-262356 on June 30, 2020. Salvador Plascencia filed the charge in 28-CA-262458 on June 29, 2020. The General Counsel consolidated the two cases and issued a complaint on November 30, 2020.

The General Counsel alleges that Respondent, the Southwest Regional Council of Carpenters violated Section 8(a)(1) in laying off Kyle Hail and Salvador Plascencia on June 1, 2020. The General Counsel alleges that Hail and Plascencia were laid off because they engaged in concerted activities for mutual aid and protection by raising concerns with Respondent about its employees' safety and working conditions in the COVID-19 pandemic.

For the reasons stated below I conclude that the General Counsel has not established that Respondent violated the Act in laying off Hail and Plascencia.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs² filed by the General Counsel and Respondent, I make the following

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FINDINGS OF FACT

I. JURISDICTION

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Respondent is an unincorporated association engaged in representing employees in bargaining with employers. It is chartered by the United Brotherhood of Carpenters and Joiners of America (UBC). The Southwest Regional Council has an office in Las Vegas, Nevada and other locations in the southwest United States. From June 26, 2019 to June 26, 2020, Respondent collected dues and initiation fees in excess of \$250,000. It remitted dues and initiation fees in excess of \$50,000 to the UBC headquarters in Washington, D.C.. Respondent is an employer engaged in commerce within the meaning of Section (2)(6) and (7) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

Respondent's management team

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The United Brotherhood of Carpenters is divided into districts which are subdivided into regional councils. The Southwest Regional Council of the UBC covers the states of Arizona, Utah, New Mexico, Colorado, Nevada and the southern part of California. The Southwest Council's office in Las Vegas oversees all the local unions in the Council's jurisdiction except for Southern California. The Council maintains suboffices in a number of locations including Denver, Albuquerque, Reno, Phoenix and Salt Lake City.

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¹ There are many errors in the transcript. Some of the more glaring are as follows:

Tr. 490. Line 1 should read Shanley, not this judge.

Tr. 629 line 17 should be threatening, not treating.

Tr. 630 line 18 should be 57 not 67.

Tr. 714, line 12: breaks should be briefs.

Tr. 729, line 19 should be Respondent's exhibits 19 and 20.

Tr. 771, line 1 should be Sollett, not this judge. I do not address counsel by their first names.

While I have considered witness demeanor, I have not relied upon it in making any credibility determinations. Instead, I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989).

Respondent Union argues at page 18 of its brief, that the General Counsel has failed to produce sufficient evidence of concerted activities because his evidence is solely the self-serving testimony of the alleged discriminatees. I would observe that is also true of the Respondent with regard to much of the material evidence in this case, for example, the discriminatees' performance issues. The non-supervisory business representatives who testified for Respondent would, I assume, like to stay in the good graces of Frank Hawk, who could get rid of them if he wanted to do so. Respondent did not produce any witnesses that I would consider neutral. Finally, it is not true that a violation cannot be proved solely with testimonial evidence, if that evidence is credible.

² I deny the General Counsel's motion to strike Respondent's brief. Assuming that the General Counsel's assertions are correct, I deem them to have no bearing on the outcome of this case.

The Las Vegas office is run by Frank Hawk, a Regional Vice-President and Chief Operating Officer. He is assisted by his brother Mike Hawk, a Regional Vice President, and Steven Dudley, the team leader of the business representatives. Frank Hawk reports to Daniel Langford, the Council's Chief Executive Officer in California.

Salvador Plascencia and Kyle Hail's employment with Respondent

In April 2016, the Council hired Salvador Plascencia as a business or special representative. In May 2017, the Council hired Kyle Hail as a business representative. Hail was also elected president of UBC local 1977, the Las Vegas local, and was a delegate to the council.

In 2018, Steven Dudley, Hail's immediate supervisor gave Hail a performance review which rated him as a "High Performer." That review continued: "Kyle knocks it out of the park speaking with the membership and keeping them involved. He handles a lot of the social media in Vegas and is very good at answering the questions that come with that. Kyle's job tracking and communication skills with contractors on and off the job sites has improved tenfold. I have no problem sending him to any job site to speak with workers or bosses."

G.C. Exh. 2.

In mid-2019, Hail and Plascencia were driving on Council business when another driver ran into the back of their vehicle. They filed for and received some workers compensation benefits as a result.

On December 14, 2019, Hail printed out his 2018 performance review. He did this after a meeting with the Council's Chief Operating Officer Frank Hawk a few days earlier, on December 12. After that meeting Hail believed he was in danger of being terminated. Hail's testimony and Frank Hawk's testimony as to what was said at that meeting is quite different.

A few days before his December 2019 meeting with Frank Hawk, Hail's wife had posted on Facebook a message criticizing the Council's health insurance. According to Hail, Hawk said that Hail was already on thin ice with his workers comp stuff and "now this fucking Facebook post." Hail defended himself by stating that he did not post the criticism, his wife did. Hail testified further that, "he [Frank Hawk] called it borderline treason. So he told me that I had to untag myself, which I did, sitting in his office. And he said that we'd have to revisit it at some point," Tr. 152-53.

Frank Hawk testified that at the December 2019 meeting, he told Hail that if he had to lay somebody off, it would be Hail. He testified that he criticized many aspects of Hail's job performance, stated that the location of Hail's tattoos made it difficult for him to send Hail on certain types of assignments and that he was still angry about Hail's use of the Council-related Facebook page in a dispute he had with a Girl Scout troop leader.³ Hawk discussed Ms. Hail's

³ R. Exh. 70. Hail believed the leader of his daughter's Girl Scout troop had been very unfair in her dealings with Hail's wife and daughter. On August 3, 2019, on the Carpenters' social media Facebook page, he appealed to fellow Union members to render assistance to his family in this dispute by disparaging the woman's animal grooming service on Yelp. At least one Union member did so.

Facebook post as well. According to Frank Hawk, he told Hail, he would “have to pick up his game,” Tr. 366-73.

Hawk testified that Hail’s job performance improved temporarily and then relapsed.

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COVID-19 and the lay-off

I need not resolve the credibility issue as to what was said on December 12, 2019. The meeting’s significance is that it establishes that Frank Hawk was very upset with Kyle Hail long before he engaged in any activity protected by the NLRA.

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On June 1, 2020, the Council laid off 20 or 21 employees.⁴ 16 of the 21 employees laid off worked in one of the California offices of the Council. The 5 laid off within the jurisdiction of the Las Vegas office were Hail, Plascencia and Gustavo Maldonado, who worked in Denver, and Orlando Guzman who worked in Reno and Juan Torres, who worked in Albuquerque. The principal issue in this case is whether Hail and Plascencia were selected for lay-off for discriminatory reasons.

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Beyond what is stated above, many of the facts in this case and inferences to be drawn from those facts are disputed. Among those are whether Hail and Plascencia engaged in protected activity, if so, did Respondent know of it and whether Respondent harbored animus towards Hail and Plascencia due to protected activity. Finally, the reasons for which the two were laid off is not documented. Most of the evidence in support of both parties’ positions consists of self-serving testimony which is unsupported by any documentation.

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Alleged Protected Activity

On March 12, 2020, the Governor of Nevada declared a state of emergency due to the COVID-19 pandemic. All non-essential activities were to cease. This included many of the activities which are the life-blood of the Las Vegas economy, such as gambling and trade shows. Construction was deemed to be essential and continued. However, carpenter union members who worked in hotels were laid off. Trade show work came to a halt. Some construction projects were cancelled or delayed.

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Hail testified that Frank Hawk did not mention the Girl Scouts incident at their December 2019 meeting or at any other time, Tr. 797, 811. He also testified that Hawk did not say anything like if I had to lay somebody off right now it would be you.

Steve Dudley testified that when he became aware of this, he told Hail, “it was not a very good look for someone employed by the Carpenters,” Tr. 667. Frank Hawk also testified that he chastised Hail shortly after Hail posted his appeal on the Carpenter’s Facebook page, Tr. 370.

Hail did not get any additional tattoos after he was hired in 2017 and was never told that it limited Respondent in the assignments it could give him.

⁴ The number depends on whether you consider the transfer of Gustavo Maldonado to the Denver Quad 4 (Carpenter/Contractor Cooperating Committee) a lay-off. Maldonado was not transferred voluntarily and lost his right to a pension from the International Union. What Maldonado’s transfer/lay-off establishes is that Respondent terminated some employees in the June/July 2020 time period for reasons unrelated to any protected activity.

Respondent instituted a number of new policies in light of the pandemic. For example, representatives were texted their assignments rather than getting them in person at the union hall. Representatives were also instructed not to ride to jobsites together and to maintain social distancing and to take other precautions, i.e., frequent hand washing, social distancing, etc.

5 Business representatives were told to stay home if they were sick or had COVID symptoms.

From the outset of COVID, representatives met in a large room, with tables in a horseshoe lay-out and with chairs arranged to maintain social distancing. Prior to COVID the representatives had gathered in a small conference room.

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Hail and business representative Douglas Lockhart were working as partners at the construction site for the Las Vegas Raiders football stadium in April 2020; Salvador Plascencia was working with representative Brandon Morris. Starting on May 5, Steven Dudley assigned Hail and Plascencia to work together-often at the stadium and Morris and Lockhart to work together-in part to prepare for the political campaign season.

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Early in the week of May 5-8, Hail and Plascencia learned that a State of Nevada agency was going to test workers at the Raiders' stadium for COVID. Plascencia testified that at a debriefing he asked if the Council would test the business representatives for COVID.

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According to Plascencia, Mike Hawk responded that the Council did not have plans to test the representatives but that if anyone thought they had COVID symptoms they should get tested. Plascencia testified that he responded by stating that a person could be infected without having symptoms.

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. On Friday, May 8, 2020, on the way to a job assignment in nearby Henderson, Nevada, Hail and Plascencia stopped at the Stadium and were tested. Plascencia also testified that he encouraged workers at the Stadium to get tested. Hail testified that they got tested, at least in part, to set an example for employees on the jobsite..

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Plascencia testified that the debriefing on May 8 was conducted by Zoom at about 3:30 p.m. Respondent's witnesses say it occurred earlier in person. I find that this discrepancy does not matter. Plascencia testified that during that meeting he let Steve Dudley know that he and Hail had been tested for COVID that morning. According to Plascencia, another representative, Alex Gonzalez, asked Dudley what the rest of the representatives would do if Plascencia and Hail tested positive. According to Plascencia, Dudley responded:

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I don't know what the fuck we're going to do with this shit, I don't know if we're going to have to fucking close the fucking building or what the fuck. Let me figure out this shit.

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Tr. 66.

Kyle Hail texted representative Douglas Lockhart on May 8, informing Lockhart that he and Salvador Plascencia had received COVID tests at the Raiders stadium. Lockhart went to the stadium and got tested that day.

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Mike Hawk testified that when he discovered that Kyle Hail and Salvador Plascencia had received COVID tests he asked one or both why they got tested. Mike Hawk testified he did so because he thought maybe they got tested because they had been exposed to someone who tested positive. Plascencia testified that nobody asked him why he got tested, Tr. 761. Hail testified
 5 that he did not believe Frank Hawk asked why he had been tested and that no other management person did so, Tr. 799. Thus, either Respondent did not express any reaction to either Plascencia or Hail obtaining a COVID test, or merely asked why they did so..

On Wednesday, May 13, Lockhart texted other representatives and Council management
 10 that he had received negative test results. Several hours later, Kyle Hail texted that he also received a phone call informing him that his test was negative for COVID. Plascencia responded: "The 3 amigos !!."

A minute later, Steven Dudley responded, :Hazzah!" Mike Hawk posted a picture of a
 15 pregnancy test a few minutes later. Lockhart texted: Lol, Kyle is pregnant?!?!?! Hail responded with reports of a significant number of positive tests among electricians at the Raiders' Stadium. "Like Doug said, it must be more sexually transmitted than previously thought. That's why the sparkies [electricians] are so badly affected."

20 R. Exh. 57, pp 185-186.

Hail testified that on about the Monday following his test (May 18?) he showed Mike Hawk and Steve Dudley a document about the electricians positive COVID test results that he obtained electronically from a carpenter at the Stadium. According to Hail, Mike Hawk and
 25 Dudley made facial gestures and Hawk made a hand motion indicating that he disapproved of Hail disseminating the document. Mike Hawk testified that he asked Hail what Respondent had to gain from copying and disseminating the document and that the information was already public, Tr. 584. Hawk also testified that he questioned the reliability of the document because Hail had taken the document off someone's desk.

30 Kyle Hail testified that Respondent continued to have buffet luncheons at its weekly debriefing session even after the Governor issued his state-of-emergency order. He testified further that as many as 18 people attended such lunches and that he expressed concerns about this to Mike Hawk and Steven Dudley. Hail testified that they were dismissive regarding his
 35 expressed concerns, telling Hail that the Union was exempt from the limitations on the size of gatherings.

I find that Respondent did not have a buffet lunch after March 24, 2020 but did have one during the prior week. Afterwards, Council staff attending the weekly in-person debriefing
 40 meetings received a box lunch with individually wrapped sandwiches, Tr. 313, 577, R. Exh. 69.

At least some council business agents were ordered to distribute care packages to retired members of the Union. They were told to call the retiree in advance and to take photographs of the retiree receiving a care package. Hail testified that he asked Dudley how representatives
 45 were supposed to maintain 6 feet social distancing when handing the care package to the retiree. According to Hail, Dudley responded, "Don't ask stupid fucking questions, just do it." Dudley responded to leading questions from his counsel as follows:

Q. Kyle says he raised the concern with you about taking pictures of the reps handing the boxes to the retiree because you couldn't safely distance for that brief interchange. And you told him, don't ask stupid fucking questions. Do you—do you—do you remember anything like that?

A. Honestly, from those meetings? I wouldn't necessarily say that Kyle himself brought it up. It was brought up several times from every rep, every concern, from every angle. So it was brought up multiple times on face-to-face meeting people. For the most part, the reps set packages down and knocked on the door, took photos that way.

Q. Did you tell the reps, don't ask stupid fucking questions.

A. No, sir, not at all.

Q. Did some reps, take pictures of them giving the—the box over?

A. Without a doubt.

Tr. 655-56.

From this testimony, I conclude that Hail and maybe others raised concerns about handing the care packages to the retirees and that at some point, the business representatives started leaving the packages at the front door and photographed the retirees at a distance.⁵ I do not find Hail more credible than Dudley as to whether he told Hail not to ask stupid questions. Moreover, after Hail submitted pictures of retirees taken at a distance, Dudley did not chastise him for not handing the care packages over at the door, Tr. 246.⁶

Hail also testified that when he mentioned possible neurological effects from COVID-19 at a debriefing session, Frank Hawk told him he was wrong and that he did not know what he was talking about. Hail's testimony on this point is un rebutted and therefore credited.

On May 30, 2020, the delegates met and were presented with a report on the Council's finances for the first quarter of 2020. Those giving the report stated that the Council's revenue had increased and that membership had increased in the first quarter. No mention was made regarding pending lay-offs.

The next day, Plascencia went to the union hall and was summoned to a meeting with Mike Hawk. Hawk told Plascencia that a lot of people had been laid off and that his name came up. When Plascencia asked for an explanation, all Mike Hawk told him was that the decision to lay him off "came from the top." Hawk told him that the lay-off was due to COVID-19. Hawk did not tell Plascencia that his lay-off was due to poor performance. The lay-off was not conducted in accordance with seniority. Plascencia and Hail had been representatives with the Council longer than several representatives who were not laid off.

⁵ This is confirmed by Hail at Tr. 237.

⁶ Respondent argues at page 21 of its brief that Hail had no reason to be concerned about contracting or transmitting COVID after receiving a negative test result. I am unaware that this is correct and am under the impression that a negative test on day 1 does not mean a person cannot get infected on day 2.

Frank Hawk also met with Kyle Hail on June 1, 2020 to inform him that he was being laid-off. Hail testified that Hawk required him to resign as local union president as a condition for getting 5 weeks' severance pay. Hawk denies that and states he encouraged Hail to resign as local president, essentially telling him it would be embarrassing to stay in this position after being let go by Respondent. Hawk did not tell Kyle Hail that he was being laid off due to poor job performance. Plascencia and Hail were laid off without any prior warning.

In August, Las Vegas Business Representative Cristóbal Corona retired. Respondent replaced Corona with a new hire, Jesus Gandara.

On several occasions between June and September 2020 some staff at the Counsel's office tested positive for COVID-19. The Union hall closed and was disinfected and staff had to self-quarantine.

Analysis

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging or otherwise discriminating against employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...* (Emphasis added)"

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

To establish an 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line*, 251 NLRB 1083 (1980). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity that is sufficient to create an inference that the employee's protected activity was a motivating factor in his or her discharge. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.⁷

⁷ In cases in which the employer's motive for allegedly discriminatory discipline is at issue, the *Wright Line* test applies regardless of whether the employee was engaged in union activity or other protected concerted activity, *Hoodview Vending Co.*, 362 NLRB 690 (2015); 359 NLRB 355 (2012).

The General Counsel established that Salvador Plascencia and Kyle Hail engaged in protected concerted activity but not that Respondent had animus towards that protected activity that contributed to the decision to lay them off.

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This record shows, for starters, that Respondent was far from indifferent regarding the exposure of its employees to COVID. It took many precautions to minimize the risk to these employees and union members generally.

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The only protected concerted activity that Salvador Plascencia engaged in was asking Mike Hawk if Respondent planned to test its employees for COVID-19 and arguably getting tested himself. Mike Hawk's response, i.e., that Respondent had no plans to test staff and that anyone who thought they had symptoms should get tested, does not constitute animus towards this protected activity. I also find that Mike Hawk's and Steven Dudley's Facebook responses to learning of the test results of Plascencia, Hail and Doug Lockhart on May 13, 2020, R. Exh. 57, pp. 185-86, [Hazzah! and the picture of a pregnancy test] do not constitute animus towards any protected activity on the part of Plascencia or Hail.

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Further, I find that Steve Dudley's response to Alex Gonzalez's question regarding what Respondent would do if Plascencia and Hail tested positive also does not constitute animus towards Plascencia and Hail's getting tested. Mike Hawk had already encouraged the representatives to get tested if they thought it was warranted. The consequences of a positive test for any of Respondent's employees would have the same consequences. Even if Dudley was angry at Hail and Plascencia, I find that a connection to their lay-off has not been established. Dudley's response, if made, reflects no more than the frustration at the unforeseen consequences many employers were facing the first months of the COVID pandemic.

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Kyle Hail testified to engaging in protected activity, but his testimony is disputed by Respondent's witnesses and is not generally corroborated by any other witness, not even Plascencia. However, I credit it.

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Hail's protected concerted activity constitutes the following:

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Raising concerns about Respondent holding in-person meetings with more than 10 people in attendance.

Mentioning in a debrief session that COVID testing was being conducted at the Raiders' football stadium construction site.

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Getting tested for COVID-possibly in concert with Plascencia;

Discussing concerns about COVID with other employees, including Doug Lockhart;

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Complaining about Respondent's buffet lunches after the start of COVID. The record establishes that Respondent ceased having buffet lunches in mid-March. For whatever reason, Respondent ceased having buffet lunches.

Complaining about having to deliver care packages to retirees without maintaining social distancing. However, the evidence establishes that at some point representatives were allowed to leave the packages at the front door instead of handing them to the retirees.

5 Obtaining a list of the electricians who tested positive for COVID at the Raiders stadium construction site.

Mentioning the possible neurological effects of COVID at a debriefing session.

10 *The General Counsel did not prove enough to support an inference that there was a causal relation between Respondent's lay-off of Kyle Hail and Salvador Plascencia and any protected activity. Thus, the General Counsel failed to meet his initial burden of proving discrimination.*

15 With regard to Kyle Hail, it is clear that his job was in danger months before he engaged in protected activity related to COVID. It is also clear that Respondent laid off a number of employees in June and that the lay-off itself was not motivated by animus towards the protected activities of Hail and Plascencia. The General Counsel does not appear to contest the authenticity of Respondent's Exhibit 24 or challenge Frank Hawk's testimony at Tr. 431. This exhibit and testimony establish that Respondent was considering laying off Hail and Plascencia no later than May 7 before they engaged in much of their alleged protected activity. Moreover, despite my hesitancy to credit Respondent's self-serving testimony on this point, I note that there is no evidence contradicting Frank Hawk's testimony that he decided to lay-off Hail and Plascencia in April, which was clearly before any of the alleged protected activity. All that changed after May 7, according to Frank Hawk, was that Respondent decided not to lay-off some employees previously slated to be let go.

30 The question remains, however, whether the evidence is strong enough to create an inference that Hail and Plascencia were selected for lay-off due at least in part to their protected activities. I find that the record is equally consistent with the proposition that Respondent used the economic downturn to get rid of 2 business representatives it was considering laying off or firing beforehand. I do not necessarily credit the testimony of Respondent's witnesses as to why they let Hail and Plascencia go and kept other representatives who were junior to them in seniority. However, despite the leading nature of much of Respondent's examination of its own witnesses, I conclude that the record does not establish that the reasons for the 2 lay-offs were pretextual.

40 Salvador Plascencia's protected activity was fairly benign and the record does not establish Respondent's animus towards him as a result. On the other hand, Respondent, and particularly Frank Hawk, had a great deal of animus towards Kyle Hail as the result of activities that were not protected. The record as a whole does not establish that Hail's protected activities were a material factor in Respondent's decision to lay him off.

Conclusions of Law

45 The General Counsel did not establish that Respondent laid off Salvador Plascencia and Kyle Hail as the result of their protected concerted activities in any material part..

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

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ORDER

The complaint is dismissed.

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Dated, Washington, D.C. August 4, 2021

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Arthur J. Amchan
Administrative Law Judge

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.